

Now, it is one thing for the Supreme Court to overturn decisions which were always contrary to the original meaning of the Constitution and which were based on faulty social theory, as I think these illegitimacy cases were. In hindsight, the Court's theory of social engineering that its decisions would not increase illegitimacy have turned out to be wrong statistically, as well as practically. We see it every day.

It is quite another thing to say that the meaning of the Constitution changes as society changes. That view suggests that Justices conduct an ongoing constitutional convention in which the law is made up as the judges go along. Overruling decisions that were never true to the Constitution in the first place is, as you understand, a judicial obligation. But the Constitution is not up for grabs with every case. Changed circumstances permit judges to justify and to change the application of the constitutional provisions. Changed circumstances do not change the core meaning of the provision. The latter belief makes it too easy for judges to enshrine their own personal prejudices into constitutional law.

So that is what I submit happens and did happen in some of these illegitimacy cases, and we have had terribly disastrous results for our country, and there is bipartisan unanimity on it. And if the President speaks in the State of the Union Message saying that we have got to do something about the illegitimacy problem, you know it is bad.

So I hope that if you are confirmed to the Supreme Court, that you would keep this distinction in mind between what is the basic Constitution as what is the application of those principles to the things of the day.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

Now we are going to move to Senator Heflin. Again, let me make it clear that it is 5 o'clock, but we are finishing tonight. So I would ask staff to let their principals know that if they have questions, please be ready to ask. I see two other of my colleagues are here prepared to go, but I want all the staff to know that we will finish with the witness tonight.

Senator Heflin.

Senator HEFLIN. Judge, in an article entitled "The Regulation of Genetic Engineering," you argue that the Government should refrain from the regulation of genetic engineering. In your article, you reference the existence of strong natural forces that tend to contain and reverse undesirable practices in connection with genetic engineering.

Would you say that these strong and natural forces govern the field of bioethics generally?

Judge BREYER. That, Senator, was a brief article years and years ago. I think it was written at a time—I don't know much about genetic engineering now, and I can say I knew less then—it was as time when people didn't know a lot about it. And I think the thrust of that was get to the scientists and find out what is really happening before you enact specific legislation. I think that was the thrust of the article.

I think since that time there have been programs in the legislatures, in statutes. I think that the executive branch has acted in

a variety of ways to try to assure adequate protection in that area, like others.

Senator HEFLIN. Well, are you skeptical of the efficacy of governmental intervention in bioethical issues?

Judge BREYER. No; it would depend on what it was. The ethical issues are very, very important, very important. If I am remembering correctly, one way in which some of those issues—I think Professor Freund wrote an article suggesting you try to get members of the community—doctors, ministers, and others—into groups that can jointly work out the way of dealing with some of these implications and problems. That kind of approach, too, not necessarily the only approach, but that can be a possible approach.

Senator HEFLIN. I think it becomes pretty clear that you try to pattern your thoughts in some organized fashion, and the word “technocrat” has been frequently used in descriptions about you. I know that technical approach has sometimes been criticized. I think Cardozo once warned of judges who become pharmacists, on the idea that they were unduly fond of neat formulas in which they separated the cases and they separated their thinking. Do you have any feeling that you are unduly a technocrat?

Judge BREYER. I hope not. I hope what I am doing is using the technical part to try to uncover the human purpose that we are trying to help. Airline, et cetera, that was technical, you can say, but they are real human beings who couldn’t afford to fly, and those real human beings have benefited, if it is a lower electricity rate, it is a lower air fare. All these technical things have to do with real people and may affect their lives a lot.

I plead guilty to a dry style of writing. That is to say when I wrote this book on regulation, the object of which, of course, was to produce a style of regulation that would be effective and that would help people. The Los Angeles Times, in reviewing that, said—I don’t know how the Los Angeles Times was reviewing a technical book, but they did, and they said, well, Alice, when she emerged from the pool of tears in “Alice in Wonderland,” turned to the door mouse, who was reading Hume’s “History of England.” “Why are you reading that,” said Alice. “We are all wet,” said the door mouse, “and this is the driest thing I know.” That was before, said the Times, Judge Breyer wrote this book. [Laughter.]

Now, I plead guilty to that, but the purpose is a human purpose.

Senator HEFLIN. You know, there are problems that we are facing, and one of the problems we are facing in the judiciary is the issue of backlogs and the creation of new judgeships. We have a number of judges that we are trying to approve or go through the confirmation process at trial and appellate level.

In some circuits, there are proposals, on the ninth circuit particularly, to increase the number of judges substantially. I think the ninth circuit has 29 judges, and the idea is to increase the size to 38. Do you think that we need to try to relook at the organization of circuits? I will ask you this, with an idea of having more of an effective administrative approach toward it for decisionmaking. Have we gotten so big in the judiciary, with so many judges, that we need to relook at some alternatives that might be available?

Judge BREYER. This is an area that you have thought about a great deal, I think, from reading what the commissions have been

that you have been on and your own experience. There are a limited number of alternatives, and eventually, I guess—you know the door-closing approach doesn't work very well. The reorganizing having more and more appellate judges has its problems. I sometimes describe that as judges can cause confusion, as well as enlightenment, and there are limitations on size and numbers at the appellate level, certainly.

The commissions have recommended, at least for future study, the possibility of additional tiers in the Federal system. Without advocating an approach, I think that eventually Congress and others like you yourself who are interested in these problems will begin to look at restructuring. That may happen. It may happen in 10 years, it may happen in 30, it may wait and see what happens to the growth.

The ultimate problem is delivering justice to people who have problems. That is the basic bottom line. If it keeps growing and growing, somehow, without depriving the public of justice, you have to work out the effective way of doing it, and that could involve restructuring at some point.

Senator HEFLIN. At the trial level, you know, we passed legislation in the Biden Civil Justice Reform Act authorizing various alternate dispute resolution techniques. There are those, including myself, who have some question about the constitutionality of the mandatory aspects of ADR that might remove the right of trial by jury. Do you have thoughts pertaining to alternate dispute resolution and whether its various forms can be effective? Do you have any advice to leave us before you assume the black robe, and probably will not give us too much advice then from a legislative viewpoint?

Judge BREYER. I don't have better than you have, the ADR, et cetera. There are human beings in the world. Those human beings have problems. They get into disputes. Really, I think what they are interested in, those people, are two things, to get the problem resolved and to get it resolved fairly.

Now, ADR, mediation, all those things have an enormous role to play, because they can sometimes get people's problems resolved faster, and then we have to watch, because there is a price that could be paid in terms of fairness that you nor I nor anyone wants to see paid. So I end up usually thinking, yes, it is a good idea to look at all those things. They can produce wonderful results inexpensively. But watch, be careful that that system doesn't turn into an unfair system.

Those are the two general things in my mind that I think about with that.

Senator HEFLIN. You reviewed a book in the New York Times entitled "Private Choices in Public Health." In that book, the authors, Philipson and Posner, who are with the Chicago School of Economic Concepts—and you have been accused of following that—used economic theory to answer the public policy question of how much the Government should spend on AIDS research. In reviewing the book, you suggested that in matters relating to health and safety policy, the Government should not use economic principles alone in determining appropriate allocation of resources.

In that book, you indicated that Government allocates considerable resources to people who, by their own choosing, put themselves in danger, such as those who live on fault lines in earthquakes, and we come back and help. I think you used the illustration where we rescue mountain climbers, even though they know the perils of where they are going into.

What principles do you think, not just economic principles, that one ought to follow in trying to follow the thing in a rational and systematic fashion? What thoughts do you have on that? In that book review, some questions are raised that are interesting, and, of course, the issue of AIDS is something that is in the minds of a lot of people today.

Judge BREYER. The thrust of the review, it was a restrained style. As I said, maybe my style is dry. I hope my thinking isn't dry. My thinking was that, no, economics doesn't. So a person had gotten into a bad fix and it was his or her own fault, to which the response is so what, so what? If somebody comes to your doorstep and they are in trouble, you help them. You help them, even if maybe it is their fault. So what?

In that kind of decision, I am not saying if you want to evaluate a program or you want to know how well something is working or you want to compare some alternatives, maybe economics has some role there. But to the basic question of how do you help, that is not an economic question. That is a moral question, and it is that kind of thing that I think people should appeal to in that area, and that is the kind of thing that they do appeal to, and you have to decide those things as matters of legislative policy.

Senator HEFLIN. You have been asked about legislative history, and this gives me some concern about the overall way that judges interpret statutes, et cetera. I suppose that maybe my own thinking is that I may be halfway between Justice Scalia's concept and yours.

We had, for example, the Vietnam war that occurred. Some people argue that that was unconstitutional, because Members of Congress did not intend to authorize the President at the time to expand the war in the manner that he did. If, however, you read the resolution, it was so broad that almost any exercise of Presidential authority in Indochina would be in conformity with the language of the resolution.

Now, you could go back and find legislative history, pretty much, that would have been that it was not intended to be as broad and as comprehensive. Now, you have a situation where that occurs, and then it may have been the authors' intent to give broad language there. So it is a problem as to how far you go relative to the language and how far you go in regards to legislative intent.

I don't know, again, maybe a technocrat can decide some of these issues, just like we have, of course, rules of statutory construction, and it may well be that you have to have some type of rules that need to be looked at.

For example, report language, which is basically the report of the chairman of the committee, but it may not be on the floor when the discussion goes on, has been really the intent to go that far, or else the Members of Congress did not read it and did not understand it.

Another instance is where you have colloquys that are put into the record and not read, but they are supposed to give legislative intent. And sometimes, we use them as a way of reaching compromises, and it seems to me that it causes problems for judges.

Report language—Justice Scalia makes a point that they never voted on, and he says that you give attention to the report language, and nobody ever votes on it, so you do not know whether or not it really was the intent of the overall Congress, or was it the intent of two or three individuals.

It just seems to me that you are going to have more and more, and you are going into a situation where you have got someone who has strong opposite feelings, perhaps, from yours—but maybe we will rely on your consensus-building ability to come up with some rules relative to it. I think there is a need for some rules relative to how legislative history ought to affect the decisions that are made relative to the interpretation of the intent of Congress.

Do you have any comments on how far you think we might go? Do you see problems with just outright saying, well, Congress says—and here it is in the Congressional Record?

Judge BREYER. It depends. I think no process works perfectly, but I would like to think that in writing reports, there used to be—and I think there is—it is a method. The different staffs of the Senators who are involved in that are supposed to, and when it is working well, they understand their Senators' positions on matters of policy, and they keep everyone informed.

It used to be before any report came out, there were no secrets; everything is circulated to everybody, and they are supposed to read it and understand whether that correctly reflects the view, the policy view, of the Senator who did the voting.

And I do not know if it always works perfectly, but it is supposed to be circulated, open, understood, and reflect the policy.

Looking to reports—yes, sometimes. Sometimes floor statements can help, and sometimes, for reasons that you say, they do not. I find it more of an art, and it is hard.

Senator HEFLIN. We are faced more and more in Congress with the issue of federalizing crimes that have historically been in the purview of the State legislatures for the crimes, and it may well be that they feel that the issue is such; but there are dangers, of course, of overburdening particularly, and judges are particularly alarmed with the idea that they are transferring more and more in the criminal field relative to it, and that that issue also has to be looked at with the Speedy Trial Act, and that civil litigation may suffer as a result of it because of the shortage of manpower, the procedures that we follow, and increasing particularly in regard to federalizing, putting more and more burdens on the Federal courts.

Do you have any thoughts as to what we ought to do relative to this?

Judge BREYER. My thinking is that people have a terrible problem with crime—it could hardly be worse; very, very bad—and they would like help with it. And in respect to jurisdiction, that is one aspect of the problem. That is not a determinative aspect.

So my suggestion, if you are asking for a suggestion, is that when Congress or a legislature of any State is working on criminal

jurisdiction, on criminalizing behavior, that they think out what is going to happen in practice when this law is enforced—who will enforce it; how; which courts will be affected—and then, with that in mind, make a judgment about how to create a system, including the way it gets into court, that will most effectively stop crime.

In other words, I am asking, I think, to think, whether it is the Justice Department, or here, or in other places, that they think through ways of allocating crime-fighting resources as well as courts, so that overall, you are more effective in the aim of fighting crime.

Senator HEFLIN. We have a number of problems dealing with the issue of armed conflicts, and the Constitution relative to Congress' power to declare war. And we have adopted the War Powers Act, but there is a lot of feeling that we have gone to the extent where executive decisions are made under the constitutional authority of Commander in Chief, and that Congress, the representatives of the people, have not really authorized the use of force in conflicts. However, that is debatable when appropriation bills are approved.

You, of course, have been here at various times. Do you have any particular thoughts concerning the authority and what ought to be done relative to this; or do you have feelings that the War Powers Act is a proper approach to this issue?

Judge BREYER. I do not have special thoughts that I would think would be particularly enlightening in that area.

Senator HEFLIN. Now let me ask you about the Judicial Conference. I am hearing more and more complaints that in the rule-making power that the courts have—they send over their rules to us, and we have a 6-month period in which to act to negate or to change during that period of time. I hear more and more that there is too much judge participation and not enough lawyer participation in the rulemaking process. And there are feelings that when you get into judicial reform, that if you leave it to judges alone, things will not change. I think C.K. Chesterton wrote a line one time saying the horrible thing about all judges, legal officials, barristers, and sheriffs was not that they were corrupt, or not that they were incompetent, but that they had become used to it, and therefore were not really looking to make much change that needed to be made. And we are living in times where change is occurring in so many different fields that we may well be looking in the future toward some changes.

But what has been your experience relative to—you mentioned a while ago the American Bar Association and the relationship between judges and lawyers getting together to have a forum where they can discuss issues. It seems to me that probably the Judicial Conference and the advisory committees have moved away from lawyer and public participants more than they should, and that that input is needed.

Judge BREYER. The input is important; the input is good. The Conference itself works mostly through committees. The biggest change that has been going on is the change resulting from the law that you described earlier, Senator Biden's Civil Reform Act, and that requires committees that are made up of lawyers and all kinds of people who are not judges to have input into that process.

My impression has been that that input has been important and has worked pretty well.

Senator HEFLIN. I think that concludes my questions.

The CHAIRMAN. Thank you.

Judge on that score, there was a great deal of resistance at the outset because of the very reason of including those folks, but I must say I have been very pleased that most of the circuits have, in an unsolicited way, come back and said, you know, this has turned out to be a good thing for us.

I think Judge Heflin has a point about the Conference itself.

But I yield now—and again, just a little mechanical scheduling here—I will yield to Senator Specter now, and what we will do then is we will have a break, but—

Senator SIMON. Mr. Chairman, I am going to have about 5 minutes, or 10 minutes at the most, of questions.

The CHAIRMAN. Well, maybe, if it is OK, we can just finish with Senator Simon, and then we will break. And then what we will do is reconnoiter 10 minutes after that and find out how many other Senators have questions. I do not think there are many more questions, Judge, and you are holding up well—your physical constitution is impressive—and then we will make a judgment as to how late we will go. But we are going to finish with you tonight.

So again, I say to the staff, please tell your principals to head on back if they have questions.

I yield to the Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Breyer, I not only compliment you on your stamina, but your family on their stamina. Of all the participants, the Senators have moved in and out—we have had votes and floor matters—and not only have you been at the podium all the time, but your wife, your three children, your brother, your sister-in-law. So it is a very impressive family support.

Judge BREYER. Thank you. I thank them, too.

Senator SPECTER. When I finished my first round, I was asking you questions about *U.S. v. Ottati and Goss*, which involved the question of potential conflict of interest. And I said at the time that I did not think there was an actual conflict of interest or anything which undermined the question of your integrity.

The question which I could not come to because of time limitation was on the issue of Lloyd's potential liability on Superfund cases; whether the principles that you set down in the *Ottati* case might have affected many other factual situations where Lloyd's could have had potential liability. And it has been called to my attention that Justice O'Connor recused herself in two cases in which NCR was a party in a tax challenge, and then participated in a case involving Colgate-Palmolive Co. on an almost identical issue which might have indirectly affected NCR's liability.

The question which comes to my mind is whether there are not ramifications which bear on public confidence, which should lead us to take another look at the language of the disqualification statute, which calls for disqualification, recusal, in a number of situations. One is "any other interest that could be substantially affected by the outcome of the proceedings." So that if a judge is to decide Superfund liability, even though it does not involve Lloyd's, the